No. 757

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Supreme Court of the United States

(OCTOBER TERM, 1945)

WARD MORRISON, JR., AUSTIN HUDSON AND ORIE A. JONES, ET AL.,
Petitioners,
VERSUS
MARYLAND CASUALTY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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Dated: Oklahoma City, Oklahoma,
January 15, 1946.

OKLAHOMA TYPOGRAPHICAL CO., 15 S. WALKER, OKLAHOMA CITY, 4, OKLA.

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Supreme Court of the United States

(OCTOBER TERM, 1945)

No.....

WARD MORRISON, JR., AUSTIN HUDSON AND ORIE A. JONES, ET AL.,
Petitioners,

VERSUS

MARYLAND CASUALTY COMPANY,
a corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, Ward Morrison, Jr.; Austin Hudson; North Western National Insurance Company, a corporation; Standard Marine Insurance Company, Ltd., a corporation; Great American Insurance Company, a corporation; Mrs. Artie Caldwell; Mrs. Velma J. Stevens; Charles B. Smith; Nora Smith; Alta L. Davis; Otto D. Donwerth; Alice C. Hair; Bertha Pitzer; Charles Leonard Clary; Myrtle Marie Clary; Draper Park Christian Church; Carl L. Harbin; Minnie L. Harbin; Orie A. Jones; Earl R. Rice; Robert A. O'Connor; John C. Bowlware; L. C. Laxson; James B.

Leverich; John D. Henderson; Earnie D. Webb; and Cynthia Dunn, in their respective individual and corporate capacities and as representative of all other individuals and corporations similarly situated, jointly and severally pray that a Writ of Certiorari issue to review the opinion and decision of the United States Circuit Court of Appeals for the Tenth Circuit entered and filed on November 5, 1945 (Tr. 75-81), Petition for Rehearing (Tr. 83-114) denied December 10, 1945 (Tr. 115), by which the declaratory judgment rendered in favor of petitioners by the District Court for the Western District of Oklahoma, filed April 13, 1945 (Tr. 59, 60), was *Reversed*: and this notwithstanding that respondent admitted and confessed in the district court (Tr. 71) and in the Circuit Court (Tr. 77), of which the Circuit Court took cognizance (Tr. 77) and with which it agreed, that at least a part of the declaratory judgment of the district court was correct and should therefore be *Affirmed*.

By the judgment of the district court it was determined and declared (Tr. 59) that liability and coverage were afforded under respondent's policy in favor of petitioners on account of loss and damage arising by reason of the negligent and hostile firing and subsequent resultant explosion of the insured truck-transport; that Endorsement No. 1 (Tr. 55-56) did not exempt respondent from liability and coverage for loss and damage occurring after the explosion and resulting from the precedent negligent and hostile firing and burning of the insured vehicle because: *First*, under the proximate cause rule such loss and damage was caused by fire (a peril and hazard admittedly covered and insured against) and not by explosion; *Second*, in no

event would the damage and loss sustained following the explosion constitute "*accidents* arising out of explosion" within the proper meaning and construction of the language employed in the exclusion clause.

In *reversing* (Tr. 75) the judgment of the district court, the Circuit Court of Appeals (contrary to applicable State and Federal decisions) held that the proximate cause rule was not applicable; that Endorsement No. 1 exempted respondent from liability and coverage for damage and loss following the explosion, though said explosion was caused by the precedent negligent and hostile fire; and that damage and loss was synonymous with the word "accidents" used in said Endorsement.

JURISDICTION

Jurisdiction of this Court is based on § 240 (a) of the Judicial Code as amended, 8 F. C. A., Title 28, § 347 (a), and on Rule 38, subparagraph 5 (b) of the Revised Rules, as amended, of this Court; jurisdiction of the courts below being based on diversity of citizenship and the existence of the requisite amount in controversy (amount involved being in excess of $25,000.00) as provided by § 24 of the Judicial Code as amended, 7 F. C. A., Title 28, § 41, and on § 274 (d), of the Judicial Code as amended, 7 F. C. A., Title 28, § 400, authorizing declaratory judgments by the Courts of the United States.

SUMMARY STATEMENT

By its declaratory judgment action (Tr. 1-24) respondent asked the district court to declare it was exempted from all liability and coverage under its policy for loss and damage resulting to petitioners following the explosion, solely by reason of the provisions of Endorsement No. 1 attached to said policy which, omitting the formal parts, reads (Tr. 25):

> "It is agreed that such insurance as is afforded by the policy does not apply to *accidents* arising out of explosion of butane gas and other volatile gases."

Respondent's policy is titled "Comprehensive Automobile Liability Policy" (Tr. 7, 24): Note the word *"Comprehensive."* The business of the assured is shown as "Butane Dealer" (Tr. 7) and the purpose of use of the insured truck-transport as "Commercial" (Tr. 13, 15). Except for Endorsement No. 1 above quoted, said policy is a standard form automobile liability policy and contains the usual provisions and obligations as to coverage, defense, settlement of suits and payment of final judgments rendered against assured customarily and universally found in such policies. The principal insuring agreement obligates and binds the respondent (Tr. 9): "To pay on behalf of the insured all sums which the insured shall become obligated to pay by reason of the liability imposed upon him by law for damages * * * sustained by any person or persons, caused by accident and arising out of the ownership, maintenance or use of any automobile." The same obligation is imposed on respondent with respect to damages to

property (Tr. 9). The policy further obligates and binds respondent, for and on behalf of assured (Tr. 9), to "defend in his name and behalf any suit against the assured alleging such injury or destruction and seeking damages on account thereof, *even if such suit is groundless, false or fraudulent.*"

The facts as found and determined by the district court (Tr. 50-54) are undisputed (Tr. 47-50). Those deemed material to a proper determination of the question presented by this petition may be briefly summarized as follows:

On March 31, 1944, and while said insurance contract was in full force and effect, the insured truck-transport was being driven in a northerly direction on South Robinson Street in Oklahoma City (Tr. 52). Said vehicle had been shortly theretofore loaded with butane and propane, highly volatile, inflammable and explosive petroleum products, at a refinery located near Oklahoma City (Tr. 47, 51). When the truck-transport had reached a point in the 4300 block on South Robinson Street, and due to negligence and carelessness of the assureds, Morrison and Hudson (Tr. 52, 53), —and certain others not parties here as joint tortfeasors,— said vehicle was on fire. Said fire was a "*hostile*" fire. The driver left the truck-transport and went to call the Fire Department. While the driver was gone, the truck-transport rolled north and against the street curb "where it continued to burn violently and had already ignited, started burning and had destroyed and damaged, in part at least, the Long-Bell Lumber Company's yard and buildings and a nearby residence, and same had been burning some con-

siderable time before the firemen arrived, and before the explosion hereinafter referred to occurred" (Tr. 52). While the firemen (certain of petitioners here) were attempting to extinguish and control the lumberyard and residential fire, and after they had been so engaged for several minutes and "as a direct and proximate result of the precedent hostile firing and burning of said truck-transport" (Tr. 52), one of the tank containers burst and exploded with great force and violence throwing fire, burning liquids and parts of the burning tank and truck for considerable distances in various directions, "causing death, damage and injury to persons and property in the surrounding area" (Tr. 52). Some of the parties sustained damage, loss and injury from the negligent and hostile fire *before* the resultant explosion. Others, including some of the firemen, sustained bodily injuries consisting, among other things, of *burns*, when the explosion occurred. Still others sustained damage, injury and loss after the explosion occurred from flying particles of the tank and transport (Tr. 53). The "negligent and hostile firing and burning of the truck-transport involved herein" preceded the explosion; and said "resultant explosion was proximately caused by, incidental to and occurred during the course and progress of said precedent, negligent and hostile fire" (Tr. 53).

The Decisions Below

Based on the foregoing facts, the district court rendered its declaratory judgment in favor of petitioners and against respondent, declaring and determining the rights of the parties as heretofore stated. The judgment of the

district court has not been, and will not be, officially published in any report of cases. But the Findings of Fact and Conclusions of Law and the judgment of the district court (duly filed of record April 13, 1945) may be found at pages 50 to 60, inclusive, of the transcript of record of this cause now on file in this Court. The findings and conclusions of the district court are full, clear and complete, the Conclusions of Law being annotated with case citations of authorities amply supporting the judgment of that court. We respectfully suggest that a reading and study thereof will demonstrate to this Court the soundness and correctness of the judgment of the district court in favor of petitioners.

The opinion and decision of the Circuit Court of Appeals *reversing* the judgment of the district court has not yet been officially reported, but may be found at pages 75 to 80, inclusive, of the transcript of record on file herein. It appears upon the face of said opinion and decision that the Circuit Court of Appeals, contrary to the mandate of this Court contained in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817, refused to follow and apply the applicable local law on the *doctrine of proximate cause* as announced by the Supreme Court of Oklahoma, — and as announced by the appellate courts of practically every other State, and by the Federal Courts.

Oklahoma Decisions Involved

Springfield Fire & Marine Ins. Co. v. *Oliphant*, 150 Okla. 1, 300 Pac. 711;

Cushing Gasoline Co. v. *Hutchins*, 93 Okla. 13, 219 Pac. 408;

National Life & Accident Ins. Co. v. *May*, 170 Okla. 198, 39 Pac. (2d) 107;

Barnett v. *Merchant's Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271;

Illinois Banker's Life Ass'n v. *Jackson*, 88 Okla. 133, 211 Pac. 508;

Metropolitan Life Ins. Co. v. *Lillard*, 118 Okla. 196, 248 Pac. 841;

General Accident, Fire & Life Assurance Corp. v. *Hymes*, 77 Okla. 20, 185 Pac. 1085;

Great Southern Life Ins. Co. v. *Churchwell*, 91 Okla. 157, 216 Pac. 676.

Federal Decisions Involved

Ætna Insurance Co. v. *Boon*, 95 U. S. 124, 130, 24 L. Ed. 395;

Louisiana Mutual Ins. Co. v. *Tweed*, 7 Wall. 44, 19 L. Ed. 65;

Lanasa Fruit Co. v. *Universal Ins. Co.*, 302 U. S. 556, 82 L. Ed. 422;

Waters v. *Merchant's Louisville Ins. Co.*, 36 U. S. 210, 224, 9 L. Ed. 691, 697;

Washburn v. *Farmers' Ins. Co.*, 11 Fed. 304;

Washburn v. *Miami Valley Ins. Co.*, 11 Fed. 633, 639;

Norwich Union Fire Ins. Soc. v. *Board of Comrs.* (C. C. A. 5) 141 Fed. (2d) 600;

Maryland Casualty Co. v. *Scharlack* (C. C. A. 5) 115 Fed. (2d) 719 (Aff. 31 F. Supp. 931);

Ætna Life Ins. Co. v. *Allen* (C. C. A. 1) 32 Fed. (2d) 490.

Other State Decisions Involved

Tonkin v. *California Ins. Co. of San Francisco, Inc.*, 62 N. E. (2d) 215;

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Western Ins. Co. v. *Skass*, 64 Colo. 342, 171 Pac. 358;

Transatlantic Fire Ins. Co. v. *Dorsey*, 56 M. D. 70, 40 Am. Rep. 403;

Fire Ass'n of Philadelphia v. *Evansville Brewing Ass'n*, 73 Fla. 904, 75 So. 196;

Hall & Hawkins v. *National Fire Ins. Co.*, 155 Tenn. 513, 92 S. W. 402;

Tracy v. *Polmetto Fire Ins. Co.* (Iowa) 222 N. W. 447;

Delametter v. *Home Ins. Co.* (Mo.) 126 S. W. (2d) 262;

American Indemnity Co. v. *Halley* (Tex.) 25 S. W. (2d) 911.

Questions Presented

(1) Was the Circuit Court of Appeals justified in holding doctrine of proximate cause was not applicable in determining liability and coverage under respondent's

policy, contrary to decisions of the Supreme Court of Oklahoma, of other Circuit Courts and of this Court, and wholly in disregard of numerous persuasive decisions from the appellate courts of other States?

(2) Was the Circuit Court of Appeals justified in ignoring and wholly disregarding the established rule, as announced by a host of decisions from the Supreme Court of Oklahoma, as respects the construction of insurance policies and clauses purporting to exempt the insurance company from liability and coverage under certain conditions?

(3) Was the Circuit Court of Appeals justified in so construing respondent's policy as to nullify all coverage thereunder while the insured vehicle was loaded with butane, contrary to local law?

(4) Was the Circuit Court of Appeals justified in holding the exclusion clause was not ambiguous?

(5) Was the Circuit Court of Appeals justified in holding and construing loss and damage sustained by some of petitioners following the explosion, as being synonymous with "*accidents* arising out of explosion" within the meaning and import of Endorsement No. 1, thereby giving said exclusion clause a liberal construction in favor of respondent,—instead of a *strict* construction against respondent,—as required by the decisions of the Supreme Court of Oklahoma?

(6) Was the Circuit Court of Appeals justified in reversing outright the declaratory judgment of the district court in favor of petitioners, when respondent has ad-

mitted in both lower courts that a portion of said judgment is correct and should therefore be *affirmed?*

Reasons Relied On for the Allowance of the Writ

(1) The opinion and decision of the Circuit Court of Appeals is in direct conflict with and in disregard of the mandate of this Court in *Erie Railroad* v. *Tompkins,* 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817.

(2) The opinion and decision of the Circuit Court of Appeals, as respects its refusal to follow and apply the doctrine of proximate cause to the factual situation here, is in direct conflict with and in disregard of the applicable local law as announced by the Supreme Court of Oklahoma in *Springfield Fire & Marine Ins. Co.* v. *Oliphant,* 150 Okla. 1, 300 Pac. 711; *Cushing Gasoline Co.* v. *Hutchins,* 93 Okla. 13, 219 Pac. 408; and is in direct conflict with and in disregard of applicable principles of law as announced by the Federal Courts in *Ætna Insurance Co.* v. *Boon,* 95 U. S. 124, 130, 24 L. Ed. 395; *Louisiana Mutual Ins. Co.* v. *Tweed,* 7 Wall. 44, 19 L. Ed. 65; *Lanasa Fruit Co.* v. *Universal Ins. Co.,* 302 U. S. 556, 82 L. Ed. 422; *Waters* v. *Merchant's Louisville Ins. Co.,* 36 U. S. 210, 224, 9 L. Ed. 691, 697; *Washburn* v. *Farmers' Ins. Co.,* 11 Fed. 304; *Washburn* v. *Miami Valley Ins. Co.,* 11 Fed. 633, 639; *Norwich Union Fire Ins. Soc.* v. *Board of Commrs.* (C. C. A. 5) 141 Fed. (2d) 600; *Maryland Casualty Co.* v. *Scharlack* (C. C. A. 5) 115 Fed. (2d) 719 (Aff. 31 F. Supp. 931); *Ætna Life Ins. Co.* v. *Allen* (C. C. A. 1) 32 Fed. (2d) 490; and is in direct conflict with and in disregard of numerous persuasive decisions of the

appellate courts of other states, particularly a recent decision of the New York Court of Appeals in *Tonkin* v. *California Ins. Co. of San Francisco, Inc.*, 62 N. E. (2d) 215.

(3) The opinion and decision of the Circuit Court of Appeals, as respects the rule that exemption clauses in insurance policies will be strictly construed against the insurance company,—and that insurance policies will be liberally construed in favor of the insured so as to effectuate rather than defeat coverage,—is in direct conflict with and in disregard of the applicable local law as announced by the Supreme Court of Oklahoma in *National Life & Accident Insurance Co.* v. *May*, 170 Okla. 198, 39 Pac. (2d) 107; *Barnett* v. *Merchant's Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271; *Illinois Banker's Life Ass'n* v. *Jackson*, 88 Okla. 133, 211 Pac. 508; *Metropolitan Life Insurance Company* v. *Lillard*, 118 Okla. 196, 248 Pac. 841; *Bankers' Reserve Life Co.* v. *Rice*, 99 Okla. 184, 226 Pac. 324; and is in direct conflict with and in disregard of applicable decisions of the Federal Courts in *Manufacturers' Accident Indemnity Co.* v. *Dorgan* (C. C. A. 6) 58 Fed. 945, 956; *B. & H. Passmore Metal & Roofing Co.* v. *New Amsterdam Casualty Co.* (C. C. A. 10—opinion by Judge Phillips), 147 Fed. (2d) 536.

(4) The opinion and decision of the Circuit Court of Appeals, as respects the burden placed on the insurance company to show that the damage and loss came within the exemption clause against coverage, is in direct conflict with the applicable Oklahoma law as announced by the Supreme Court of Oklahoma in *General Accident, Fire & Life Assurance Corp.* v. *Hymes*, 77 Okla. 20, 185 Pac. 1085;

Great Southern Life Ins. Co. v. *Churchwell,* 91 Okla. 157, 216 Pac. 676.

(5) The opinion and decision of the Circuit Court of Appeals is therefore in direct conflict with and in disregard of the applicable decisions and principles of law as announced by the Supreme Court of Oklahoma; as announced and followed by other circuit courts and by this Court; and as enunciated and approved by numerous decisions from the appellate courts of other states. Thus the lower court has so far departed from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

(6) The Circuit Court of Appeals has rendered an erroneous opinion and decision on a question of general public importance, and one of far reaching import and effect,—especially as respects the insurance field of law,—upon which this Court should write an opinion and decision correctly determining the issues involved and the rights of the parties, in accordance with applicable principles of law, as indicated by the decisions heretofore referred to.

WHEREFORE, petitioners jointly and severally respectfully pray that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Tenth Circuit commanding and directing that Court to certify and send to this Court for its review and determination, a full and complete transcript of the record below, and all proceedings had therein, and that the opinion and decision of said Circuit

Court of Appeals be reversed and that the Judgment of the district court be reinstated, and that petitioners be restored to all their rights thereunder, and that petitioners have such other and further relief as may be just and to which they may be entitled in the premises.

Respectfully submitted,

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Of Counsel.

CERTIFICATE

I, counsel for petitioners, hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court, and that it is not filed for the purpose of delay.

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Dated: Oklahoma City, Oklahoma,
January 15, 1946.

Supreme Court of the United States

(October Term, 1945)

No.....

Ward Morrison, Jr., Austin Hudson and Orie A. Jones, et al.,
Petitioners,
VERSUS
Maryland Casualty Company,
a corporation,
Respondent.

BRIEF IN SUPPORT OF PETITION

STATEMENT OF THE CASE

This has already been sufficiently stated in the preceding Petition under the heading "Summary Statement," which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

(1) The Circuit Court of Appeals erred in holding that the doctrine of proximate cause was not applicable in determining liability and coverage under respondent's insurance policy.

(2) The Circuit Court of Appeals erred in holding that Endorsement No. 1 exempted respondent from liability and coverage for loss and damage sustained by some of petitioners following the explosion, where said explosion

was merely incidental to, occurred during the course of, and was directly and proximately caused by a precedent negligent and hostile fire, for which liability and coverage were admittedly furnished under respondent's insurance policy.

(3) The Circuit Court of Appeals erred in holding that "loss and damage" sustained by some of petitioners following the explosion were synonymous with "*accidents* arising out of explosion" within the meaning and import of Endorsement No. 1.

(4) The Circuit Court of Appeals erred in holding that Endorsement No. 1 was unambiguous.

(5) The Circuit Court of Appeals erred in giving said exclusion clause, Endorsement No. 1, a liberal construction in favor of respondent instead of a strict construction against respondent, as required by applicable State and Federal decisions.

(6) The Circuit Court of Appeals erred in *reversing* outright the declaratory judgment of the district court in favor of petitioners, when under the admissions of respondent made in both lower courts, said judgment was in part correct and should have been *affirmed*.

ARGUMENT

First Point

The Circuit Court of Appeals erred in holding (contrary to local law and decisions of this Court, other Circuit Courts and other State Courts) that the doctrine of proximate cause was not applicable in determining liability and coverage under respondent's policy, and that Endorsement No. 1 exempted respondent from liability and coverage for loss and damage following the explosion, where said explosion was merely incidental to, a part of, and was directly and proximately caused by a precedent negligent and hostile fire, for which liability and coverage were furnished under respondent's policy.

(1) Oklahoma is committed to the rule that clauses in insurance policies purporting to exempt the insurer from liability under certain conditions will be construed strictly against the insurer and liberally in favor of the insured. *National Life & Accident Ins. Co.* v. *May*, 170 Okla. 198, 39 Pac. (2d) 107; *Barnett* v. *Merchant's Life Ins. Co.*, 87 Okla. 42, 208 Pac. 271; *Illinois Banker's Life Ass'n* v. *Jackson*, 88 Okla. 133, 211 Pac. 508. This rule has been recognized and followed by the Tenth Circuit in *B. & H. Passmore Metal & Roofing Co., Inc.* v. *New Amsterdam Casualty Co.* (opinion by Judge Phillips) 147 Fed. (2d) 536.

This rule is equally well settled in Oklahoma that insurance contracts will be liberally construed in favor of insured so as to effectuate, rather than defeat, liability and coverage. *Bankers' Reserve Life Co.* v. *Rice*, 99 Okla. 184, 226 Pac. 324. And where insurance policy is reasonably susceptible to different constructions that construction

most favorable to insured will be adopted. *Metropolitan Life Ins. Co.* v. *Lillard*, 118 Okla. 196, 248 Pac. 841.

Thus where insurance contract is capable of two constructions,—under one of which recovery is allowed but under the other of which recovery is denied,—that construction will be followed which permits recovery. *Maryland Casualty Co.* v. *Scharlack* (C. C. A. 5) 115 Fed. (2d) 719 (Aff. 31 Fed. Supp. 931).

In Oklahoma, the burden is upon the insurance company which asserts the restriction against liability and coverage, to show that the loss and damage fell within the exclusion clause. *General Accident, Fire & Life Assurance Corp.* v. *Hymes*, 77 Okla. 20, 185 Pac. 1085; *Great Southern Life Ins. Co.* v. *Churchwell*, 91 Okla. 157, 216 Pac. 676.

It appears upon the face of the opinion that the Circuit Court of Appeals did not follow and apply these fundamental rules in construing and interpreting respondent's policy and Endorsement No. 1.

(2) It is conceded by respondent (Tr. 77) that a fire negligently and hostilely caused is one of the hazards and perils covered and insured against by its insurance policy, and that it is liable under said policy for loss and damage caused petitioners by fire before the resultant explosion. Respondent further concedes (Tr. 78) that if the proximate cause rule is applicable, it is also liable to petitioners for loss and damage sustained following the explosion, since the latter event was merely incidental to and occurred as a direct and proximate result of the pre-

cedent negligent and hostile fire. By holding the proximate cause rule inapplicable, the Circuit Court of Appeals nullified the admitted coverage and liability under respondent's policy, and denied petitioners their right to be protected for the full effects and results of the insured hazard and peril.

In so holding, the Circuit Court of Appeals refused to follow and apply the applicable local law as announced by the Supreme Court of Oklahoma in *Springfield Fire & Marine Ins. Co.* v. *Oliphant*, 150 Okla. 1, 300 Pac. 711. In that case the Court, in paragraph 2 of the syllabus, held:

> "In an action on a fire insurance policy which exempted insurer from liability where loss occurred by explosion, unless fire ensues, and in such event for the fire damage only, the insurer is liable for the damage caused by explosion as well as damage by fire, where the explosion was caused by a preceding hostile fire."

An excellent discussion as to the applicability of the proximate cause rule in cases of this kind is contained in the body of the Court's opinion in the above case, to which we invite the attention of this Court. It is submitted this case is in point on principle with the case here; and that there is no justification for the lower court's conclusion that the cases are distinguishable because a fire insurance policy is involved in the cited case and an automobile liability insurance policy (comprehensive) is involved in our case. Both are insurance policies, and the same general rules of construction are applicable to both, particularly

as to application of the proximate cause doctrine, rule of liberal and strict construction, etc.

(3) Other Circuit Courts, and this Court, have followed and applied the proximate cause rule in determining liability and coverage under insurance policies in a variety of situations, where were involved exclusion or exemption clauses even broader and more inclusive than Endorsement No. 1.

In *Washburn* v. *Miami Valley Ins. Co.*, 11 Fed. 633, at 639, Judge Swayne said:

> "Now, there is another remark, perhaps rather hypercritical, but proper in this connection to be made, and that is, according to the technical formality of the law of insurance this explosion cannot be recognized. It was a part of that fire—just as much a part of the fire, and admitted to be as such, covered by the insurance, as if there had not been an explosion."

In *Waters* v. *Merchant's Louisville Ins. Co.*, 36 U. S. 210, 224, 9 L. Ed. 691, 697, Mr. Justice Story used this language:

> "Some suggestion was made at the bar whether the explosion, as stated in the pleas, was a loss by fire, or by explosion merely. We are of opinion that as the explosion was caused by fire, the latter was the proximate cause of the loss."

In *Norwich Union Fire Ins. Soc.* v. *Board of Comm'rs* (C. C. A. 5) 141 Fed. (2d) 600, the Court squarely held that contracts insuring against direct loss or damage are governed by the doctrine of proximate cause. In support of its holding the Court cited and relied on the opinion of

this Court in *Lanasa Fruit Co.* v. *Universal Ins. Co.*, 302 U. S. 556, 82 L. Ed. 422. See also in this connection:

—*Louisiana Mutual Ins. Co.* v. *Tweed*, 7 Wall. 44, 19 L. Ed. 65;

Washburn v. *Farems' Ins. Co.*, 11 Fed. 304;

Ætna Life Ins. Co. v. *Allen* (C. C. A. 1) 32 Fed. (2d) 490.

It thus appears that the opinion of the Circuit Court of Appeals in the instant case is in conflict with, and contrary to, the decisions of other Circuit Courts and of this Court. Therefore this Court is justified in granting certiorari for the purpose of resolving said conflict.

(4) The appellate courts of other states have likewise followed and applied the doctrine of proximate cause in determining liability and coverage under insurance policies, including: ordinary fire insurance policies on private dwellings or business structures; automobile fire insurance policies; automobile theft insurance policies; and automobile collision policies. In each of these cases, the various State Courts have held that the particular exemption clause did not relieve the insurance company from liability and coverage where the act or thing which set the events in motion finally resulting in the loss did not come within the exclusion clause, and was a hazard and peril admittedly insured against.

We call the Court's particular attention to a recent opinion and decision of the New York Court of Appeals in *Tonkin* v. *California Ins. Co. of San Francisco, Inc.*, 62 N. E. (2d) 215. There plaintiff was driving his car along

the street in New York when he noticed his car was smoking and burning under the dashboard. A gust of smoke caused him to lose control of his car, resulting in a collision with another vehicle. Practically all of his loss resulted from the collision. The policy provided coverage for loss or damage to the automobile from fire, theft and wind storm, but excluded loss by collision. Defendant conceded liability for loss by fire but denied liability for that portion of damage resulting from collision on the ground it was excluded from coverage under the policy.

But the New York Court of Appeals held such loss was not excluded, saying:

> "The policy language is definite enough to exclude loss when collision is the primary and exclusive cause, and it would do so here except for the fact that fire—the hazard insured against—was the factor causing the driver to lose control of the vehicle and was so closely associated with it in point of time and character as to constitute the proximate producing cause of the collision."

The opinion and decision in the above case is set out in full in "Petition of Appellees for Rehearing" filed in the lower court, and appears at pages 91 to 94, inclusive, of the transcript of record. It is submitted that an analysis of this case will disclose that it cannot be distinguished in principle from the instant case.

Other State decisions supporting our position that the rule of proximate cause is applicable are: *German Ins. Co.* v. *Hyman*, 42 Colo. 156, 94 Pac. 27; *Western Ins. Co.* v. *Skass*, 64 Colo. 342, 171 Pac. 358; *Transatlantic Fire*

Ins. Co. v. *Dorsey*, 56 M. D. 70, 40 Am. Rep. 403; *Fire Ass'n of Philadelphia* v. *Evansville Brewing Ass'n*, 73 Fla. 904, 75 So. 196; *Hall & Hawkins* v. *National Fire Ins. Co.*, 155 Tenn. 513, 92 S. W. 402; *Tracy* v. *Polmetto Fire Ins. Co.* (Iowa) 222 N. W. 447; *Delametter* v. *Home Ins. Co.* (Mo.) 126 S. W. (2d) 262; *American Indemnity Co.* v. *Halley* (Tex.) 25 S. W. (2d) 911.

See also Blashfield's Ency. of Automobile Law, Vol. 6 (Part 1) pages 278, 279, 295.

(5) Actually what the Circuit Court of Appeals has done in the instant case,—or so it appears to us,—is to apply the doctrine of proximate cause in reverse in arriving at its conclusion. Thus the lower court erroneously concluded that the loss and damage sustained by petitioners following the explosion, "arose out of explosion" within the meaning and import of Endorsement No. 1, simply because the explosion was nearer in point of time to the loss and damage than was the fire. But this conclusion disregards the fact that the efficient, primary and motivating cause,—the real proximate cause of such loss and damage,—was the precedent fire which was the superior, controlling and responsible agency bringing about the explosion and without which it would not have occurred, the explosion simply being a part of the antecedent fire.

In *Cushing Gasoline Co.* v. *Hutchins*, 93 Okla. 13, 219 Pac. 408, the Supreme Court of Oklahoma states the applicable rule as follows in paragraph 5 of the syllabus:

> "The proximate cause is the efficient cause; the one that necessarily sets other causes in operation. The

causes that are merely incidental or instruments of a superior controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

This statement of the rule was taken *verbatim* from the opinion and decision of this Court in *Ætna Insurance Co.* v. *Boon*, 95 U. S. 124, 130, 24 L. Ed. 395. See also the general statement of the rule in 38 Am. Jur. 696.

Thus it clearly appears the lower court, contrary to the mandate in *Erie Railroad* v. *Tompkins*, 304 U. S. 64, 82 L. Ed. 1188, 58 Sup. Ct. Rep. 817, refused to follow and apply the applicable local law, and wholly disregarded persuasive decisions from other State Courts.

Second Point

The Circuit Court of Appeals erred in so construing respondent's policy as to nullify all coverage thereunder, contrary to local law.

The effect of the decision of the lower court was to hold that insured had no insurance coverage or protection whatsoever so long as the truck-transport was being used to haul butane. Such construction and such result cannot be properly countenanced nor justified under the provisions of the policy when considered as a whole. This was a "comprehensive" automobile liability insurance policy. The exclusion endorsement may not be properly construed alone and without reference to the remainder of the policy. It must be construed in relation to the other

provisions of the policy, and in such way as not to nullify the liability and coverage admittedly afforded thereunder. One of the perils and hazards covered was loss and damage from fire negligently caused by the operation of the insured vehicle. Merely because an explosion occurred as a direct and proximate result of such precedent negligent fire, did not justify the lower court in so construing the exclusion endorsement as to nullify the admitted coverage, so that insured is afforded no insurance protection under such circumstances. Yet, we submit, that is exactly what the lower court did in its present opinion and decision.

In so holding, the lower court has construed the exclusion endorsement strictly against the insured and liberally in favor of the insurance company, in violation of the decisions of the Supreme Court of Oklahoma heretofore cited. Surely this is not permitted under the Erie Railroad Case.

Third Point

The words "accidents arising out of explosion" contained in exclusion clause are ambiguous, and Circuit Court of Appeals erred in not resolving such ambiguity in favor of petitioners, as required by local law.

Both the district court and the lower court held Endorsement No. 1 was not ambiguous. But the difference is the district court held the proper construction of said Endorsement did not exempt respondent from liability and coverage for loss and damage after the explosion, while the lower court held it did.

Such a situation has been previously held by the Tenth Circuit to be some indication that ambiguity exists in the language of the policy. *Franklin* v. *American Nat'l Ins. Co.*, 135 Fed. (2d) 531 (opinion by Judge Huxman).

Exactly what is meant by the words "accidents arising out of explosion?" What would constitute an accident within the meaning of the language employed? Would loss and damage sustained by petitioners following the explosion be considered "accidents" within the meaning of the language employed, where the explosion was preceded and proximately caused by an accidental fire? Or would the fire accidentally and negligently caused be considered the "accident" and the loss and damage following from the subsequent explosion be considered as just that,—loss and damage? And are the words "accidents arising out of explosion," as the lower court appears to hold, synonymous with "damage and loss" arising out of explosion?

That such questions as to possible meaning of the language employed occur, would seem to indicate ambiguity. If ambiguity existed it was the duty of the lower court to resolve same in favor of petitioners, in accordance with the Oklahoma decisions heretofore cited. This the lower court failed to do, thereby again violating the Erie Railroad Case.

Fourth Point

The Circuit Court of Appeals erred in treating loss and damage sustained by petitioners following explosion as being synonymous with "accidents arising out of explosion" within meaning of language of Endorsement No. 1.

It seems quite obvious that the lower court erred as above stated. In more than one place in its opinion the lower court says that losses are exempted from coverage under the policy if they arose out of explosion of butane gas.

But this is not what the exclusion endorsement says. The Endorsesment does not provide that no coverage shall be afforded for "losses" arising out of explosion but that no coverage is provided for "*accidents*" arising out of explosion. This is the language employed by the insurance company. It chose and fixed the wording of the Endorsement. And the word it employed was "accidents" and not "losses." Certainly this cannot be without significance and without meaning. Had the insurance company meant to exempt "losses" arising out of explosion from coverage it could easily have so provided, but it chose not to do so.

The lower court was without authority to substitute or read into the exclusion clause language respondent did not employ. That court was required to take the Endorsement as it found it and (under Oklahoma law) construe it strictly against respondent. This the lower court refused to do, but throughout its opinion and decision erroneously treated and construed "losses" as "accidents" contrary to express wording of the exclusion clause.

And in no event could it be said that it appears here that loss and damage resulted from "accidents" arising out of explosion. The injuries and damage sustained by petitioners following the explosion were not "accidents" but were simply "losses,"—foreseeable results and consequences of the explosion caused by the precedent negligent fire. The fire, and not the explosion, was the "accident" (Tr. 23, 24).

But the lower court, again ignoring the Erie Railroad Case, construed the exemption clause liberally in favor of respondent and strictly against petitioners, contrary to Oklahoma law.

Fifth Point

The Circuit Court of Appeals erred in reversing outright the declaratory judgment of the district court in favor of petitioners, when under the admissions of respondent made in both lower courts, said judgment was in part correct and should have been affirmed.

In the opinion and decision of the lower court it is stated that (Tr. 77): "On this record, the appellant concedes liability under its policy for all damages caused by the fire prior to the explosion."

Notwithstanding this, the lower court rendered a straight order of *reversal*, without any modification. Since the district court specifically held (Tr. 55) that respondent was liable and coverage was afforded under its policy for damage and loss caused by fire before the explosion, if the

present order of *reversal* of the lower court stands without modification, it might be hereafter contended that under the rule of *res judicata* respondent had no liability whatever, even for the loss and damage occurring by fire before the explosion.

Certainly petitioners should not be required to assume this hazard. We believe that the action of the lower court in this regard constitutes such departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision, as indicated in subparagraph 5 (b) Revised Rules, as amended, of this Court.

CONCLUSION

In holding the proximate cause rule inapplicable, thereby nullifying the admitted coverage under respondent's policy, and in adopting a strict rule of construction against petitioners, the opinion and decision of the Circuit Court of Appeals is contrary to the Oklahoma law, in conflict with decisions of other Circuit Courts and of this Court, and wholly ignores many persuasive decisions of other State Courts. The main question is one of general importance in the field of insurance law, upon which this Court should further speak.

It is therefore respectfully submitted that a Writ of Certiorari should be granted, that the decision of the Circuit

Court of Appeals for the Tenth Circuit should be reversed, and the judgment of the district court should be reinstated and affirmed.

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